Order

Michigan Supreme Court
Lansing, Michigan

May 10, 2023

164753 & (50)

In re JARZYNKA.

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

JERARD M. JARZYNKA, CHRISTOPHER R. BECKER, RIGHT TO LIFE OF MICHIGAN, and MICHIGAN CATHOLIC CONFERENCE,
Plaintiffs-Appellants,

v

SC: 164753
COA: 361470

COURT OF CLAIMS JUDGE,
Defendant-Appellee,

and

PLANNED PARENTHOOD OF MICHIGAN and SARAH WALLETT,
Other Parties-Appellees.

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On order of the Court, the application for leave to appeal the August 1, 2022 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to dismiss is DENIED.

VIVIANO, J. (*concurring*).

I agree with the Court's denial order because this case is moot. The statute being challenged, MCL 750.14, has been superseded by constitutional amendment and was recently repealed.[1] I write, however, to highlight significant concerns with the Court of Claims' handling of this case. In every case that comes before our courts, it is imperative that the court rule fairly, impartially, and according to the law. To ensure that this occurs, various doctrines limit the judicial power by preventing courts from deciding abstract questions when no live controversy between adverse parties exists, requiring courts to abide by binding precedent, and prohibiting courts from exercising power over persons and entities who are not parties to the case before the court. In the present matter, I am

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[1] The repealing act, 2023 PA 11, will be effective on the 91st day after the end of the regular 2023 legislative session.

concerned that the trial court may have flouted all of these fundamental principles. The Court of Claims' apparent eagerness to issue a preliminary injunction in a seemingly unripe case without adverse parties, its willingness to sidestep binding Court of Appeals caselaw, and its attempt to bind nonparties to its ruling give rise to many troubling questions. That it did so in a case involving perhaps the most politically fraught issue to come before the courts, abortion, only heightens those concerns. Trust in the judiciary is eroded when courts exercise raw power in any case, let alone one of this magnitude.

I. FACTS AND PROCEDURAL HISTORY

In the underlying litigation, plaintiff Planned Parenthood filed suit against the Attorney General on April 7, 2022, seeking a declaratory judgment that MCL 750.14 is unconstitutional under the state Constitution's Due Process Clause. The statute criminalizes the administration of abortions.[2] The Court of Claims rejected the Attorney General's argument that no cognizable controversy existed because the Attorney General agreed with Planned Parenthood that the statute was unconstitutional.[3] The court went on to grant a preliminary injunction against enforcement of the statute on the basis that, among other things, Planned Parenthood had shown a substantial likelihood of success on the

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[2] It provides:

> Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.
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> In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed. [MCL 750.14.]

[3] In response to plaintiff's motion for a preliminary injunction, the Attorney General contended that there was no adversity and that for the court to appropriately provide relief there must be an actual controversy. Puzzlingly, and without providing any legal support for her position, she nevertheless declined to move for dismissal because "[t]he legal issues in this case are important." To the press, however, the Attorney General stated that, "[f]rankly, I believe that the case should be dismissed for lack of jurisdiction because there's no case or controversy[.]" LeBlanc, *Nessel: Dismiss Planned Parenthood Abortion Case; Whitmer's Suit Should Take Precedence*, Detroit News (May 3, 2022) <https://www.detroitnews.com/story/news/local/michigan/2022/05/03/nessel-planned-parenthood-abortion-case-should-dismissed/9631380002/> (accessed May 2, 2023) [https://perma.cc/8MQU-GM4Y].

merits. The court purported to bind all prosecutors in the state to this injunction, even though no such prosecutors were parties to that case.[4]

II. JUSTICIABILITY CONCERNS

A. RIPENESS

At the time the lawsuit was filed, there was no dispute that the statute could not be enforced contrary to the then-binding decision in *Roe v Wade*, 410 US 113 (1973), rev'd by *Dobbs v Jackson Women's Health Org*, 597 US ___; 142 S Ct 2228 (2022), and this Court's own decision in *People v Bricker*, 389 Mich 524 (1973), which construed the statute to conform with *Roe*'s decision that the federal Constitution protects abortion. It is worth noting that while *Roe* was subsequently overturned in June 2022, this Court has never revisited *Bricker*. Thus, Planned Parenthood challenged a statute that was largely (if not completely) unenforceable.[5] For this reason, it appears plain that the case was unripe for adjudication when filed. Any decision could have no effect on the rights and obligations of the parties—any such effect depended on hypothetical or anticipated changes to the law in the future.[6] But the Court of Claims was undaunted by this and appeared eager to declare that the unenforceable statute was also unenforceable for other reasons.

B. LACK OF CONTROVERSY

More problematic was the Court of Claims' disregard of the need for an adversarial posture between the parties. The Attorney General agreed with Planned Parenthood on the merits that the already unconstitutional statute was unconstitutional. The Attorney General

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[4] The case currently before the Court stems from a writ of superintending control filed by some of the prosecutors and other groups seeking to have the Court of Claims' decision vacated and the case dismissed. The Court of Appeals let the preliminary injunction stand but, as will be discussed more below, held that the injunction did not bind the nonparty prosecutors.

[5] And it does not appear that Planned Parenthood desired to strike down the statute's application to situations that were not encompassed by *Roe*'s protection. Planned Parenthood did not contend that *Roe*'s protections should be extended under the state Constitution to situations that *Roe*'s protections did not encompass and to which, consequently, the statute might apply. So the lawsuit appears to have been filed to challenge the statute's application to circumstances in which the statute could not legally be applied.

[6] See *Van Buren Charter Twp v Visteon Corp*, 503 Mich 960, 965 (2019) (VIVIANO, J., dissenting).

therefore conceded that there was no controversy, recognizing that no dispute on the merits existed between the parties. The Court of Claims sidestepped this argument for a bewildering—and utterly unconvincing—array of reasons.

To begin with, the court noted that under current Michigan caselaw on the standing doctrine, this Court has recognized that the state Constitution does not contain a case-or-controversy requirement, which is the source of the standing doctrine in federal law.[7] But this discussion—which extended to multiple paragraphs—was offered by the Court of Claims simply for the proposition that Michigan law applies to decide whether the case is justiciable. The discussion, in other words, was put forward to offer an unchallenged and almost self-evident observation as to which law applies.

And the substance of the discussion was irrelevant and, indeed, simply a distraction. The issue before the court did not involve standing. Moreover, while *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 364 (2010), may have held that state standing law does not emanate from a case-or-controversy requirement, such a requirement is applicable to this case. Planned Parenthood sought a declaratory judgment, which is governed by MCR 2.605. It provides, in pertinent part, "*In a case of actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."[8] Indeed, "[t]hat a declaratory judgment must address an 'actual controversy' is central to the legitimacy of the device."[9] This Court has held that the controversy requirement was essential to the constitutionality of providing declaratory relief.[10] Consequently, the Court of Claims' reference to *Lansing Sch* seems only to have distracted from the proper analysis.

As to the question of whether a controversy existed, the Court of Claims offered essentially two points. First, the court noted that a declaratory judgment is meant to guide future behavior and can be issued before losses occur. But there was no need for such guidance in May 2022. The statute was already unconstitutional under federal law, and this Court had interpreted the statute to conform to that law. While there was some intimation that federal law might change,[11] that hardly sufficed to make the case about

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[7] See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 364 (2010).

[8] MCR 2.605(A)(1) (emphasis added).

[9] *Van Buren*, 503 Mich at 964 (VIVIANO, J., dissenting).

[10] *Washington-Detroit Theatre Co v Moore*, 249 Mich 673 (1930).

[11] Prior to *Dobbs* being issued, in a significant breach of the Supreme Court's protocol, a draft of the majority opinion was leaked and made available to the public. See Gerstein &

something more concrete than hypothetical or anticipated future events; i.e., the case remained unripe. And there were no similar rumors that this Court would be reconsidering its binding interpretation of the statute in *Bricker*.

The Court of Claims' second assertion was that there was adversity in the present case because the Attorney General appeared to desire that the case be dismissed for lack of adversity. That twisted logic hardly needs a response, but it is worth noting that it makes a mockery of the adversity requirement, which, as I will discuss shortly, is a central component necessary for the exercise of judicial power. If the Court of Claims were correct, then it would generally be impossible to dismiss a case for lack of adversity in these circumstances: if the Attorney General moved to dismiss the case on this ground, adversity would be created; if the Attorney General did not move to dismiss the case on this ground, then it would be up to the court to raise the matter sua sponte.[12]

The Court of Claims was wrong to sweep aside the controversy requirement. For centuries, it has been a central feature in the proper exercise of judicial power. One legal historian has noted:

> For centuries, Anglo-American lawyers have thought that the very existence of most kinds of judicial proceedings depends upon the presence (actual or constructive) of adverse parties. As Blackstone put it, "[i]n every court there must be at least three constituent parts . . .: the actor, or plaintiff, who

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Ward, Politico, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows* (May 2, 2022) <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> (accessed April 24, 2023) [https://perma.cc/HTA9-ZATH].

[12] The Court of Claims also decried the result that would occur if no controversy were deemed to exist: It "would destroy an aggrieved party's ability to obtain a meaningful legal ruling with actual effect. According to defendant's thesis, in any case challenging the constitutionality of a statute the Attorney General would be empowered to derail a constitutional challenge by simply communicating a non-specific consonance with the plaintiff's position." This is, of course, a threat posed when the executive branch refuses to defend the constitutionality of statutes. See generally *League of Women Voters of Mich v Secretary of State*, 506 Mich 905, 907-910 (2020) (VIVIANO, J., concurring) (discussing the problems with executive nondefense of statutes). But it is also simply incorrect that a truly aggrieved party cannot challenge a statute in these circumstances. When executive officers charged with enforcing a statute decline to do so against a party, it is difficult if not impossible to see how that party is aggrieved by the statute. This is especially so in the present case. Not only was the Attorney General *not* attempting to enforce the statute against Planned Parenthood; she was legally barred from doing so and there was no immediate prospect that this would change.

> complains of an injury done; the reus, or defendant, who is called upon to make satisfaction for it; and the judex, or judicial power."[13]

These views informed the constitutional convention in 1787.[14] But even outside the express "case or controversy" requirement in the United States Constitution, the very concept of judicial power has been thought to require adverse parties. As one scholar notes, at the time of the federal convention

> [r]eferences to the "judiciary power," or the similar term "judicial authority," consistently meant some type of adversarial proceeding before a tribunal, even if the body in question was not a court. According to James Wilson's subsequent law lectures, the role consisted of "applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them."[15]

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[13] Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv L Rev 1559, 1568 n 29 (2002), quoting 3 Blackstone, *Commentaries on the Laws of England* (1768), p *25. "A century and a half earlier, Coke had said much the same thing": " 'in everie Judgement there ought to be three persons, Actor, Reus, and Iudex.' " *Id*., quoting 1 Coke, The First Part of the Institutes of the Laws of England (1628), p 39a.

[14] As Professor Philip Hamburger notes, "the English had become cautious about resolutions and even advisory opinions, and Americans tended to go still further in narrowing judicial office, especially in their statutes defining jurisdiction." Hamburger, *Law and Judicial Duty* (Cambridge: Harvard University Press, 2008), p 541. The view of judicial office as limited to specific cases and controversies "became explicit during the Constitutional Convention, as did the implications for the judicial authority to expound the law." *Id*. Judges could expound upon the law only through their office in judging actual cases. *Id*. at 543; see also Woolhandler, *Adverse Interests and Article III*, 111 Nw U L Rev 1025, 1026-1027 (2017) ("In 1800, Representative John Marshall interpreted the 'Case[]' in Article III to incorporate a similar set of requirements [i.e., similar to Blackstone's]: '[t]here must be parties to come to court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.' Numerous Supreme Court decisions reiterate the need for parties with adverse interests who will be bound by the results of the litigation.") (citation omitted).

[15] Jay, *Most Humble Servants: The Advisory Role of Early Judges* (New Haven: Yale University Press, 1997), p 64 (citations omitted).

Montesquieu similarly defined the "judicial power" as " 'punish[ing] crimes, or determin[ing] the disputes that arise between individuals . . . .' "[16] In this regard, the limitation of judicial power to actual controversies between adversely positioned individuals was a critical component of the separation of powers, for it served to cabin "the coercive authority of a tribunal," which "[h]istory had instructed [was] . . . 'a power . . . terrible to mankind' and "a potent source of tyranny when combined in hands that also wielded legislative or executive authority."[17] Given these views, one scholar concluded that "it is hardly likely that the Framers were thinking about mere 'advice or recommendation' when they invoked the term 'judicial power.' "[18]

Michigan law has long recognized the controversy requirement as a prerequisite for the exercise of judicial power. As a general matter, we have defined the "judicial power" in the same manner as the definitions above requiring adversity.[19] In *Daniels v People*, we stated, "By the judicial power of courts is generally understood the power to hear and determine controversies between adverse parties, and questions in litigation."[20] Justice CAMPBELL similarly observed, "The broadest definition ever given to the judicial power confines it to controversies between conflicting parties in interest . . . ."[21] And Justice

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[16] *Id*. (citation omitted; alterations in original).

[17] *Id*. (citations omitted).

[18] *Id*.

[19] See generally *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 627-628 (2004), overruled on other grounds by *Lansing Sch*, 487 Mich 349 ("In fact, the 'judicial power' in the Michigan Constitution, with the several exceptions enumerated above, is the same 'judicial power' as in the federal constitution, and it is the same 'judicial power' that has informed the practice of both federal and state judiciaries for centuries."). *Lansing Sch* focused on the standing doctrine and, in any event, appeared to reaffirm the adversity requirement by noting that the standing test it was replacing "may prevent litigants from enforcing public rights, despite the presence of adverse interests and parties . . . ." *Lansing Sch*, 487 Mich at 370.

[20] *Daniels v People*, 6 Mich 381, 388 (1859); see also *Nat'l Wildlife Federation*, 471 Mich at 614 ("The 'judicial power' has traditionally been defined by a combination of considerations," including "the existence of a real dispute, or case or controversy[,] . . . [and] the existence of genuinely adverse parties[.]").

[21] *Lloyd v Wayne Circuit Judge*, 56 Mich 236, 243-244 (1885) (opinion of CAMPBELL, J.).

COOLEY's seminal treatise noted, "It is the province of judicial power . . . to decide private disputes between or concerning persons . . . ."[22]

The controversy requirement has come to the fore perhaps in no place more than the declaratory relief statutes. As noted above, in order to comply with the Constitution, our declaratory judgment rule requires an "actual controversy" before the court can issue declaratory relief. The predecessor to our current rule was struck down in *Anway v Grand Rapids R Co*,[23] on the basis that it lacked an adversarial requirement. There, we noted at the outset that "[a]bstract questions cannot be made the subject of an action."[24] Continuing, we said that "[w]here it is apparent that the object of a case is not the vindication of a right, but a desire to obtain an interpretation of a statute by a test case, this court will not assume jurisdiction of the cause."[25] We made clear that we would not decide difficult questions without a real controversy with "adverse interests."[26] We took the key line from the United States Supreme Court:

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[22] Cooley, Constitutional Limitations (1868), p 92 (quotation marks and citation omitted).

[23] *Anway v Grand Rapids R Co*, 211 Mich 592, 606 (1920).

[24] *Id*. at 610 (quotation marks and citation and omitted).

[25] *Id*. (quotation marks and citation and omitted); see also *id*. at 615 ("The duty of this court is limited to actual pending controversies. It should not pronounce judgment on abstract questions, even if its opinions might influence future action under like circumstances.") (quotation marks and citation and omitted).

[26] *Id*. at 612 ("It is not sufficient that the parties be real and not fictitious, but the controversy must be real and not *pro forma*, nor is it sufficient that the facts exist as they are set out in the action; nor that the complainant has a cause of action, but beyond these, the question arises, Is the suit prosecuted to redress the grievance of the plaintiff, or to affect third persons, who may be interested in the same question already pending in another suit, and which is the primary and real object of the proceeding? If the latter, the suit should be dismissed. Courts cannot be used for the purpose of deciding even real questions in *pro forma* suits, especially when the object and purpose is to affect important litigation between other parties. If so, the most complicated and difficult questions of law, and the constitutionality of statutes might be settled by the court upon such *pro forma* proceedings, when no real controversy or adverse interests exist, and no proper examination of the important questions is made by counsel or the court.") (quotation marks and citation omitted); see also *id*. at 612-613 ("Courts of judicature are organized only to decide real controversies between actual litigants. When, therefore, it appears, no matter how nor at what stage, that a pretended action is not a genuine litigation over a contested right between opposing parties, but is merely the proffer of a simulated issue by a person dominating both sides of the record, the court, from a sense of its own dignity, as well as from regard to the

> "[J]udicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants . . . . The right to declare a law unconstitutional arises because an act of congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government."[27]

In upholding a new declaratory judgment statute in *Moore* because it contained a controversy requirement, we declared the principle that "an actual and *bona fide* controversy" was required before the court could adjudicate a dispute, and we stated that "[s]uch a case requires that all the interested parties shall be before the court."[28] We likewise emphasized that the exercise of judicial power required a live dispute between real parties: " 'When adverse litigants are present in court and there is a real controversy between them, a final decision rendered in any form of proceeding of which the court has

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public interests, will decline a determination of the fabricated case so fraudulently imposed upon it.") (quotation marks and citation omitted).

[27] *Id*. at 616-617, quoting *Muskrat v United States*, 219 US 346, 361 (1911). As Professor Erwin Chemerinsky has noted, one of the United States Supreme Court's rationales for prohibiting advisory opinions is that specific disputes help present issues crisply. See Chemerinsky, *Federal Jurisdiction* (7th ed), p 47 (" '[The rule against advisory opinions] implements the separation of powers [and] also recognizes that such suits often are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.' "), quoting *Flast v Cohen*, 392 US 83, 96-97 (1968). As Chemerinsky puts it, "For over 200 years . . . it has been established that federal courts may not decide a case unless there is an actual dispute between adverse interests." *Id*. at 48. Accordingly, "[m]any of the . . . justiciability doctrines seek to ensure that existence of an actual dispute between adverse litigants." *Id*. at 49. With regard to declaratory judgments, in particular, the Court has required actual controversies. It upheld the constitutionality of a declaratory judgment statute because it required a controversy between adverse parties. See *id*. at 53 ("The Court concluded that '[w]here there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised . . . .' "), quoting *Aetna Life Ins Co v Haworth*, 300 US 227, 241 (1937).

[28] *Moore*, 249 Mich at 677.

jurisdiction is a judgment in the proper sense of that term, and the giving of it is a judicial function . . . .' "[29]

Another area, relevant to the present case, in which courts have emphasized the adversity requirement is in cases involving collusive suits:

> Such agreements among parties have long been condemned by the United States Supreme Court:
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> > [A]ny attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court. [*Lord v Veazie*, 49 US (8 How) 251, 255 (1850).]
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> This is particularly true when the constitutional validity of a statute is at stake:
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> > Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must . . . determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act. [*Chicago & Grand Trunk R Co v Wellman*, 143 US 339, 345 (1892).]

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[29] *Id*. at 682. The principles from this line of cases were recently expressed in a number of statements in *In re House of Representatives Request*, 505 Mich 884 (2019) (CLEMENT, J., concurring) (stating that the judicial power is "the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction") (quotation marks and citations omitted); see also *id*. at 913 n 4 (MARKMAN, J., dissenting) (noting same).

> The Supreme Court has accordingly declared that no controversy exists to adjudicate when both sides seek the same result. See *Moore v Charlotte-Mecklenburg Bd of Ed*, 402 US 47, 47-48 (1971) (dismissing case when both sides argued that a law was constitutional and should be upheld). And the Court has dismissed individual claims and vacated judgments on such claims when no controversy existed as to those claims, even in situations like the present case, where the parties have adequately disputed other issues. See *Webster v Reproductive Health Servs*, 492 US 490, 512-513 (1989) (dismissing one of several claims because no controversy existed regarding it when appellees abandoned their argument); *Williams v Zbaraz*, 448 US 358, 367 (1980) (vacating the portion of a judgment regarding a constitutional claim that the district court had no jurisdiction to decide because of the lack of adverse contentions and controversy, but reaching other issues in the case).[30]

In light of this longstanding law, I have very serious concerns that the Court of Claims improperly exercised judicial power when no controversy between adverse parties was present.

C. CONCLUSION ON JUSTICIABILITY

The justiciability principles that the Court of Claims appears to have disregarded here—ripeness and the need for controversy—are meant to keep courts in their proper and constitutionally assigned lane. When not one but two such core principles are flouted, questions naturally arise concerning the purposes and intentions of the judiciary. This is particularly so when they occur in a case involving one of the most politically charged subjects that could possibly come before the courts: abortion. Failure to adhere to essential restraints on the exercise of judicial power makes it appear as though law is simply politics by other means. And when this occurs, trust in the judiciary, if not the government as a whole, is greatly diminished.

III. DISREGARD OF BINDING CASELAW AND APPLICATION TO NONPARTIES

What makes the lower court's handling of the case even more questionable is that the court acted in apparent disregard of binding law to the contrary regarding a state constitutional right to abortion. In *Mahaffey v Attorney General*, the Court of Appeals held that the state Constitution did not protect the right to abortion:

> When the 1963 constitution was adopted, abortion was a criminal offense. See MCL 750.14; MSA 28.204. The drafters of a constitutional

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[30] *League of Women Voters*, 506 Mich at 906-907 (VIVIANO, J., concurring).

> provision are presumed to have known the existing laws and to have drafted the provision accordingly. *Bingo Coalition for Charity—Not Politics v Bd of State Canvassers*, 215 Mich App 405, 412; 546 NW2d 637 (1996). Thus, we must presume that the drafters of the 1963 constitution were aware of the statutory prohibition against abortion. The fact that the 1963 constitution itself and the debates of the Constitutional Convention preceding the adoption of the constitution are silent regarding the question of abortion indicates that there was no intention of altering the existing law. We believe that the addition of a fundamental right to abortion to the constitution "would have been such a marked change in the law as to elicit major debate among the delegates to the Constitutional Convention as well as the public at large." *People v Thompson*, 424 Mich 118, 129; 379 NW2d 49 (1985). Furthermore, less than ten years after the adoption of the constitution, essentially the same electorate that approved the constitution rejected a proposal brought by proponents of abortion reform to amend the Michigan abortion statute. See *People v Bricker*, 389 Mich 524, 529; 208 NW2d 172 (1973). Under these facts, we cannot conclude that the intent of the people that adopted the 1963 constitution was to establish a constitutional right to abortion.[31]

In its conclusion, the Court of Appeals found "that the right to privacy under the Michigan Constitution does not include the right to abortion."[32]

We can safely assume that the Court of Claims judge here was very familiar with this case, as she argued it for the losing side.[33] She eluded it here by seizing on *Mahaffey*'s concluding lines that referred to the right of privacy under the state Due Process Clause. Instead, the Court of Claims decided that there was a right to abortion under the same clause but on a different theory: the purported right to bodily integrity. Of course, in doing so, the Court of Claims disregarded *Mahaffey*'s core analysis which more broadly found no basis for a right to abortion in our constitution or any evidence that the framers and ratifiers intended there to be such a right.

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[31] *Mahaffey v Attorney General*, 222 Mich App 325, 336 (1997).

[32] *Id*. at 345.

[33] Her participation as an advocate for the plaintiff in *Mahaffey*, her receipt of the "Planned Parenthood Advocate Award" while practicing law, her long history of representing pro-abortion groups (including Planned Parenthood) before becoming a judge, and her continuing support of Planned Parenthood, a party in this case, as an annual donor, were the basis for a motion for her recusal from this case. While that motion is not before the Court, it raised serious questions about whether the trial judge should have recused herself in this case. And, for the same reasons, petitioners in the present matter have also requested that we require her recusal on remand, but as noted, this matter is now moot.

The Court of Claims reasoned that "there can be no doubt but that the right to be let alone—the right to bodily integrity—was understood by the ratifiers of the 1963 Michigan Constitution as a fundamental component of due process." While it is entirely permissible to distinguish otherwise binding caselaw, it is worth questioning whether any purported right to privacy under the Constitution is sufficiently different from a right to "be let alone." And it is also noteworthy that even though this supposedly distinct right was well-known in 1963, it was apparently not argued as a basis for the right to abortion in *Mahaffey* in 1997. Consequently, the Court of Claims offered, at best, the thinnest of reeds with which to evade the scope of binding caselaw.

Once rid of *Mahaffey*, the Court of Claims attempted to extend the reach of its contrary holding not only to the parties before the court but to all prosecutors across the state. There is a " 'deep-rooted historic tradition that everyone should have his own day in court.' "[34] "Indicating the strength of that tradition," courts have frequently invoked "the general rule that 'one is not bound by a judgment *in personam* in litigation in which he is not designated as a party or to which he has not been made a party by service of process.' "[35] In the present case, the Court of Claims attempted to circumvent this longstanding rule by invoking MCL 14.30, which provides that the "Attorney General shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices . . . ."

Although the Sixth Circuit has cited this statute to declare that a ruling against the Attorney General would bind nonparty prosecutors,[36] I agree with the contrary conclusion reached by Court of Appeals in the case below.[37] The Court of Appeals noted that prosecutors have significant discretionary authority in carrying out their duties.[38] In addition, I would note that nothing in MCL 14.30 suggests that the Attorney General can

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[34] *Taylor v Sturgell*, 553 US 880, 892-893 (2008) (citation omitted).

[35] *Id*. at 893.

[36] *Platinum Sports Ltd v Snyder*, 715 F3d 615 (CA 6, 2013). That decision is not binding on state courts. See *Abela v Gen Motors Corp*, 469 Mich 603, 607 (2004) ("Although lower federal court decisions may be persuasive, they are not binding on state courts.").

[37] *In re Jarzynka*, unpublished order of the Court of Appeals, entered August 1, 2022 (Docket No. 361470), p 3.

[38] *Id*., citing *Fieger v Cox*, 274 Mich App 449, 466 (2007) ("Pursuant to MCL 49.153, prosecuting attorneys in Michigan possess broad discretion to investigate criminal wrongdoing, determine which applicable charges a defendant should face, and initiate and conduct criminal proceedings.").

countermand the local prosecutor's charging decisions. The functions of supervision, consultation, and advising do not necessarily indicate control. Rather, it appears that the Legislature has provided a separate process for the Attorney General to interject herself into local criminal proceedings. Under MCL 14.28, the Attorney General "may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested." This suggests that the Attorney General does not have control over the local prosecutor—otherwise, the Attorney General would not need to intervene.

IV. CONCLUSION

Although these matters are now moot, I believe that the conclusions reached by the Court of Claims, and the manner in which those conclusions were reached, are deeply troubling.[39] In an exceptionally high-profile and politically charged case, the Court of Claims disregarded core limitations on judicial power, offered dubious distinctions of binding precedent, and sought to impose its judgment on nonparties with no connection to

[39] Planned Parenthood, which is not a party to this case, has requested that we dismiss the case as moot and vacate the Court of Appeals order holding that the preliminary injunction did not apply to all local prosecutors. As an initial matter, it seems apparent that as a nonparty, Planned Parenthood has no standing to seek dismissal of this case. Moreover, while it is true that we generally vacate lower court decisions in moot cases, that practice is grounded in equity and is not a hard rule. *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 588-589 (2020). In that regard, it is noteworthy that the decision Planned Parenthood seeks to have vacated is a nonbinding order issued by the presiding judge and dismissing plaintiffs' petition for lack of standing. Moreover, it is even more telling that despite admitting this matter is moot because, among other independent reasons, MCL 750.14 has been repealed, Planned Parenthood did not move in its bypass application in this Court to vacate the Court of Claims' decisions in its favor enjoining enforcement of the statute. *Planned Parenthood of Mich v Attorney General* (Docket No. 164959). From this perspective, the selective invocation of vacatur smacks of gamesmanship. For these reasons, I believe that a denial of leave, rather than a dismissal for mootness, is appropriate.

the case. It may justifiably be questioned whether such actions are consistent with the proper judicial role or whether they suggest that courts are becoming adjuncts to political ends.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 10, 2023

Clerk

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